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In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 620

THE DELAWARE AND HUDSON COMPANY, *Petitioner*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and CONNECTICUT RAILWAY AND LIGHTING COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Delaware and Hudson Company prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, affirming the decision of the District Court for the District of Connecticut in the instant case.

OPINIONS BELOW

The opinion of the District Court for the District of Connecticut is reported at 128 F. Supp. 550 (A., p. 38a).* The opinion of the Court of Appeals is not yet reported but a copy is appended hereto (Appendix I).

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*References to Petitioner's Appendix below, submitted to this Court with this petition, are herein denominated: A., p. —.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on November 7, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

The District Court sitting in bankruptcy under Section 77 (for reorganization of a railroad) disallowed the claim of this creditor on the ground that it was not capable of liquidation or of reasonable estimation under Section 57d. of the Bankruptcy Act. After the passage of a consummation order, the Court, pursuant to the plan of reorganization, set aside a fund of common stock. This was done in order to satisfy creditors' claims which should later become liquidated. Thereafter this creditor's claim was liquidated by a judgment of a state court. Does this creditor have a *legal right* to share in the fund, or does the earlier decision on its claim in bankruptcy amount to liquidation of that claim as valueless?

STATUTES INVOLVED

Section 57d. of the Bankruptcy Act, 11 U.S.C., Section 93(d), provides:

> "d. Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however*, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay

the administration of the estate or any proceeding under this Act."

Section 57d. is made applicable to railroad reorganization by Section 77(1) of the Bankruptcy Act. *Old Colony Bondholders v. New York, N. H. & H. R. Co.*, 161 F. 2d 413, 428 (2d Cir. 1947), cert. denied 331 U.S. 859. This and other pertinent portions of Section 77 of the Act, 11 U.S.C., Section 205, referred to herein, are reprinted in Appendix II.

JURISDICTION BELOW

The District Court had jurisdiction over the proceedings for reorganization of Respondent, The New York, New Haven and Hartford Railroad Company, under Section 77 of the Bankruptcy Act.

STATEMENT

This case arises out of the reorganization under Section 77 of the Bankruptcy Act of the New York, New Haven and Hartford Railroad Company (hereafter called "the Debtor"). Various aspects of those complicated proceedings have been before this Court on previous occasions (see particularly, *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 F. 2d 413, cert. denied 331 U.S. 859; *Connecticut Railway & Lighting Co. v. Palmer*, 305 U.S. 493 (REED, J.)). While the present petition involves a narrow issue of bankruptcy law, a brief summary of the background is necessary.

In 1909 the Boston Railroad Holding Company (hereafter called "the Holding Company") was chartered in Massachusetts to hold securities of the Boston and Maine Railroad. The Debtor has always owned all of the Holding Company common stock; it also has always owned all except 28,000 of the 272,939 shares of its preferred stock. The 28,000 shares were sold to the public

by the Debtor prior to the commencement of the Debtor's reorganization under Section 77 of the Bankruptcy Act in 1935. Each stock certificate so sold contained a guaranty by the Debtor (A., p. 4a).

This case involves this guaranty by the Debtor of (1) cumulative dividends on and (2) upon liquidation of the Holding Company, the $100 par value of the 24,150 of these 28,000 shares, which were still in the hands of public owners when the Debtor went into reorganization. Shortly after initiation of the reorganization proceedings the Debtor's trustees defaulted on guaranteed dividend payments, and a claim was timely filed on the guaranty in the reorganization proceedings (Claim No. 82, A., p. 65a). The trustees in their answer (A., p. 68a) opposed all claims on the guaranty on the ground that they were so uncertain and contingent as not to be allowable (Section 57d.). The Protective Committee, which assumed management of this claim, also filed a petition (A., p. 81a) seeking to compel the Debtor's trustees to bring about the liquidation of the Holding Company, so that a valuation of the guaranty of the par value of the preferred shares could be ascertained.

The plan of reorganization for the Debtor, eventually approved, confirmed and consummated, provided for disaffirmance of the guaranty of the Holding Company stock (A., p. 108a). The plan expressly left the holders of the shares to an unsecured claim for breach of the guaranty (A., p. 107a). Petitioner, The Delaware and Hudson Company, purchased 10,000 of these shares for about $670,000 early in 1944. In the same year the reorganization court approved the plan, denied the petition of the Protective Committee seeking to compel the trustees to liquidate the Holding Company, and entered an order as to the claims on the guaranty (Order No. 763, A., p. 80a).

In Order No. 763 and in its Memorandum of Decision on the claim (A., p. 69a) the Court properly treated as separate the

claims (1) on account of the guaranty of accumulated dividends and (2) on account of the guaranty of par value. The Court allowed a payment of $32 a share as to the first, and no question is raised here as to that determination. But the Court "wholly disallowed, denied and dismissed" the claim as to par value because there had been no liquidation of the Holding Company. The Court noted that such liquidation "may and probably never will come to pass." Thus the Court clearly adopted the trustees' position and disallowed the claim under authority given to it by Section 57d. Petitioner did not appeal from this order, since it assumed that the Court in Order No. 763 had not found that its claim was valueless but only that the claim was not presently capable of liquidation. Moreover, since a pool of common stock of the reorganzied Debtor adequate to satisfy petitioner's claim was to be reserved by the plan for unsecured claims liquidated subsequent to a consummation order, petitioner assumed its claim was adequately protected.

Despite the District Court's prophecy about the unlikelihood of liquidation of the Holding Company, the Massachusetts legislature dissolved it in 1946 (A., p. 118a), and after years of litigation in Massachusetts,* liquidation of the Holding Company in the Massachusetts courts was completed in March, 1953. At that time the court determined that each share of preferred stock would be entitled to a distribution of $11.33 in liquidation.

The valuation of the claim for breach of the guaranty of par value thus having been settled at $88.67 per share, ($100 — 11.33), petitioner initiated the present proceeding to secure satisfaction of its then liquidated claim against the pool of common

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*The Massachusetts litigation reached this Court on two occasions. *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 323 Mass. 282, 81 N.E. 2d 553, appeal dismissed 336 U.S. 932; *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 328 Mass. 63, 102 N.E. 2d 67, cert. denied 343 U.S. 920.

stock reserved by the plan for unsecured claims liquidated subsequent to consummation (A., p. 3a). Petitioner contended that it had *a legal right* to such relief under the provisions of the consummated plan regarding the common stock reserved for unliquidated unsecured claims. In particular Section J(17) of the Plan provided:

> "The common stock available for distribution to the holders of unsecured obligations and claims shall be distributed among them upon the basis of the relationship between the amount of each claim as finally allowed by the court to the total amount of all such claims. The public holders of 24,150 preferred shares of the Boston Railroad Holding Company shall, *to the extent finally allowed by the Court for any breach of the contract of guaranty, both for par value and dividends,* be included among the holders of unsecured obligations and claims." (Italics added.)
>
> "The court shall determine at the time of consummation the amount of common stock necessary to be reserved for the satisfaction of claims not then liquidated and shall reserve the amount so determined for that purpose (any excess so reserved to be sold by the reorganization committee and the proceeds distributed in lieu of stock or scrip to the holders of the new common stock)."

Section K of the Plan provided in pertinent part:

> "The principal debtor's guaranties of the bonds of the New York, Westchester and Boston Railway Company . . . and of the preferred stock of the Boston Railroad Holding Company, shall not be assumed by the reorganized company. No payment shall be made by the reorganized company upon, or on account of, such guaranty of the preferred stock of the Boston Railroad Holding Company, except as provided in clause (17) of section J hereof . . ."

Section XI, 2, (f) and (g) of the Consummation Order (A., p. 131a) reserved jurisdiction of the Court:

> "(f) To consider and act in the matter of the proof of any claim against the Debtor which shall have been filed or for which provision shall have been made in the Plan as of the date of this order but the amount of which shall not have been fixed.
>
> "(g) To consider and act in the matter of the reservation of the shares of Common Stock of the Reorganized Company in so far as necessary to provide for any claim, including the claim of the Secured Sixes for the difference above mentioned, the amount of which has not been fixed as of the date of this order."

Despite the language of these provisions, the District Court has here held that petitioner had no right to the relief sought. The Court states that petitioner's claim was removed by Order No. 763 from the category of unliquidated claims, or claims the amounts of which had not been fixed. In its petition petitioner also claimed that, even if it did not have a legal right to the relief sought, the Court had power under various provisions of the Bankruptcy Act and under Rule 60(b) of the Federal Rules of Civil Procedure to reopen its decree and grant the relief requested. The District Court found it unnecessary to determine its equitable power in this respect for it held, after an extensive review of the facts, that petitioner should not be granted equitable relief.

Upon appeal the Court of Appeals for the Second Circuit affirmed. As to petitioner's claim of a legal right to share in the reserved pool of common stock, the Court held that Order No. 763 took petitioner's claim out of the category of unliquidated or unfixed claims. It pointed to the language in Order No. 763 that the claim on the guaranty of par value was "wholly disallowed, denied and dismissed" and stated that "it is difficult to imagine, any allowance more 'final' than this or any 'liquidation' more explicit." Petitioner submits that the Court below at that

point lost sight of the fact that under the Bankruptcy Act the fact that a claim is "wholly disallowed, denied and dismissed" is not synonymous with the claim being liquidated and valueless. On the contrary, where a claim is disallowed, denied and dismissed under Section 57d., it is by definition unliquidated and of uncertain value. Petitioner will demonstrate that its claim was clearly of the latter variety, and that the courts below thus erred as a matter of law. The bulk of the Court of Appeals' decision deals with petitioner's right to equitable relief, relief as of right having been denied. Petitioner believes that the Courts below incorrectly balanced the equities in this matter, but it recognizes that such issue may not be one of sufficient general importance to warrant this Court's consideration. Therefore, petitioner at this time restricts its prayer for review to the narrow issue of law presented. Thus petitioner submits that it was entitled *as a matter of law* to the relief requested by its petition to the Bankruptcy Court.

REASONS FOR GRANTING THE WRIT

This case presents the important question of the effect in railroad reorganization proceedings under Section 77 of the Bankruptcy Act of the disallowance of a claim because it is not capable of liquidation or reasonable estimation, as is permissible under Section 57d. of the Act. The Courts below, by denying petitioner *the legal right* to participate in a fund reserved for claims liquidated subsequent to consummation of the plan, held in effect that such disallowance is a decision that the claim is valueless, i.e. has been liquidated at zero. Petitioner submits that such reasoning misconstrues the effect of a decision pursuant to Section 57d. in proceedings under Section 77, is contrary to the intent of the Bankruptcy Act, is inconsistent with statements of this Court and lower courts regarding the treatment of creditors in railroad reorganization proceedings, and is contrary to results where Section 57d. is applied in bankruptcy proceedings under

sections of the Act other than Section 77. This important question of federal law has not been, but should be decided by this Court.

It is clear that Order No. 763 disallowed petitioner's claim for breach of the guaranty of the par value of the Holding Company stock because the Court was unable to ascertain the value of petitioner's claim. No effort was made to estimate its value. Thus, in disallowing the claim, the Court proceeded under Section 57d. which it assumed to be applicable in proceedings under Section 77. See Order No. 763 (A., p. 80a) and Memorandum of Decision on Claim No. 82 (A., p. 69a). In particular note (A., p. 77a) that the allowance on the claim for breach of the guaranty of cumulative dividends was made after a determination that Section 57d. did not foreclose allowance of that claim.

The authors of 5 *Collier on Bankruptcy*, 536-7, in considering railroad reorganization proceedings under Section 77 discuss the problem presented by this case. They note that "where claims are not susceptible of liquidation or estimation, or such liquidation or estimation would unduly delay reorganization, a problem arises." They conclude that in order for the plan to satisfy the requirement that it be fair and equitable (Section 77(e)), provision should be made "to pay to holders of such claims, if they become absolute, the value of the securities that would have been allotted to them had the claims been absolute at the time of reorganization." Thus, these eminent authorities on the Bankruptcy Act assert that creditors in petitioner's position are entitled to relief.

In ordinary bankruptcy when a claim is denied pursuant to Section 57d., no problem arises because of the application of Section 63d. which provides that any contingent or unliquidated claim that has been proved but not allowed shall be deemed not provable under the Act and thus not dischargeable. See 3 *Collier*, 195 et seq., 1916. It has never been suggested in such proceed-

ings that a disallowance not on the merits but under Section 57d. amounted to a liquidation at zero. A different result should not be reached in a Section 77 proceeding, and in so holding the courts below have applied Section 57d. in an inconsistent manner.

Section 63d. is not applicable in railroad reorganization proceedings since such proceedings are designed for rehabilitation rather than liquidation. (See Sections 77(b) and 77(f)). Still, consistency with the results in ordinary bankruptcy proceedings and the clear intent of Congress in enacting Section 57d. require a holding that provision must be made in reorganization plans for claims not capable of immediate liquidation. We surmise that this Court may have denied review in *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 F. 2d 413, cert. denied 331 U.S. 859, because the lower courts had there held Debtor's reorganization plan to have made adequate provision (the reservation of shares of common stock) for claims that were not capable of liquidation at the time of consummation. We claim there is implicit in this *Old Colony* decision the provision of a substitute in Section 77 proceedings for the survival of unliquidated claims after discharge in ordinary bankruptcy. This substitute (a *legal right* to allowance when a claim becomes liquidated) has here been denied by the Courts below. Petitioner should have been awarded its legal right to a share of the securities set aside for the owners of unliquidated claims.

This Court has upheld the power of the agencies entrusted with railroad reorganization proceedings to eliminate valueless claims from participation in such proceedings. *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 475 (REED, J.); *R.F.C.* v. *Denver & R.G.W.R. Co.*, 328 U.S. 495, 509 (DOUGLAS, J.). We infer from such decisions that a claim not valueless has *a legal right* to participate in the reorganization proceedings. Where, as here, the liquidated value of a claim is not ascertained until after

consummation of the plan, participation may have to be limited to sharing in funds or securities held for the purpose. In depriving petitioner of this legal right to participate, the Courts below have acted inconsistently with the basis of those decisions.

Railroad reorganization under Section 77 is a matter in which broad power is granted to the federal courts. Conflicts of decision seldom arise. Yet the nature of the proceedings requires close scrutiny by this Court. And when a lower court has reached a result contrary to basic concepts of equitable reorganization, review by this Court is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 31, 1955.

APPENDIX I

[Caption omitted in printing.]

Before:

CLARK, *Chief Judge,* and

MEDINA and LUMBARD, *Circuit Judges.*

Appeal from the United States District Court for the District of Connecticut, Carroll C. Hincks, *Judge.*

The Delaware and Hudson Company appeals from the denial, D. C. Conn., 128 F. Supp. 550, of its petition to reopen an order in the proceedings for the reorganization of the New York, New Haven and Hartford Railroad Company which had disallowed the claim of owners of preferred stock of the Boston Railroad Holding Company based on a guaranty of par value and dividends thereof by the New Haven. Affirmed.

FREDERICK H. WIGGIN, New Haven, Conn. (Wiggin & Dana and John W. Barnett, New Haven, Conn., on the brief), *for petitioner-appellant.*

J. H. GARDNER, JR., New Haven, Conn., *for respondent-appellee The New York, New Haven and Hartford Railroad Co.*

EDWARD K. HANLON, New York City (Beekman & Bogue and A. T. Wenzell, New York City, on the brief), *for respondent-appellee Connecticut Railway and Lighting Co.*

CLARK, *Chief Judge:*

The Delaware and Hudson Company appeals from an order in the reorganization proceedings of The New York, New Haven and Hartford Railroad Company which dismissed its petition for reopening of Order 763, entered on Claim 82 in the reorganization proceedings on August 4, 1944. Although the Consummation Order and Final Decree in the proceedings was entered on September 11, 1947, the present petition was not filed until May 11, 1953, or nearly six years later. The original Claim 82 was based upon the New Haven guaranty of the par value and

accrued dividends of the preferred stock of the Boston Railroad Holding Company. Now Delaware, as presently an owner of certain of these shares and relying on a variety of reasons for its delayed action, seeks a reopening of the proceedings to obtain a greater allowance for its benefit than has heretofore been accorded this interest. Although the complex facts and the several arguments deduced therefrom have been presented with skill and adroitness, we are constrained to conclude, as Judge Hincks convincingly demonstrates in his reasoned opinion, D. C. Conn., 128 F. Supp. 550, that Delaware's position is fundamentally untenable.

The Boston Railroad Holding Company was a corporation specially chartered in 1909 by the Commonwealth of Massachusetts to hold the securities of the Boston and Maine Railroad, and all its common stock has always been owned by the New Haven. In 1910 the charter of the Holding Company was amended (Acts and Resolves of Mass. 1910, c. 639) to permit the issuance of preferred stock having a par value of $100 per share. In provisions set forth at 128 F. Supp. 552, 553, this amendatory Act prescribed a preference on liquidation for the preferred stock up to its par value, plus accrued dividends, and further prescribed payment of semiannual cumulative dividends, with the stock and its accrued dividends a charge and lien upon the Boston and Maine Railroad stock held by the Holding Company; it then provided means by which a majority of preferred stockholders could, in case of default in payment of dividends, apply to the Supreme Court of Massachusetts for an order of sale of the Boston and Maine stock to enforce the lien of the preferred stock thereon. Its §5 also authorized a railroad corporation owning any of the common stock of the Holding Company to hold the preferred and to guarantee payment on the preferred of dividends and of par value on liquidation. Pursuant to this section the Holding Company issued 272,939 of its preferred shares to the New Haven; and in 1911, the New Haven sold 28,000 of these shares to the public. On all the stock certificates for this stock appears the New Haven's guaranty of

cumulative dividends and the $100 par value upon which this claim is based.[1] When the New Haven went into reorganization in 1935, 24,150 of these shares were still in the hands of public owners. Of the remaining preferred shares, the New Haven held 247,759, and 1,030 were in the treasury of the Holding Company.

After the start of the reorganization proceedings in 1935, the New Haven trustees pursuant to court order made four regular guaranteed semiannual preferred stock dividend payments. They defaulted, however, on all preferred dividends which became due after July 10, 1937.

On March 30, 1936, the president of the Holding Company, acting on behalf of those holding its guaranteed preferred stock, filed an unsecured claim (Claim 82) for the dividend due on January 10, 1936, and for further dividends that would thereafter become due. The management of this claim was then assumed by a Protective Committee for the preferred stockholders which

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[1] "For value received, The New York, New Haven and Hartford Railroad Company, a corporation established and acting under the laws respectively of Connecticut, Massachusetts and Rhode Island, hereby guarantees the payment of cumulative dividends on the shares of stock represented by this certificate at the rate of four per centum (4%) per annum as stipulated in this certificate, and the payment of one hundred dollars ($100.) upon each share of said stock in case of liquidation or distribution of Boston Railroad Holding Company, and of any deficiency resulting from a sale under the provisions of Section 4 of Chapter 639 of the Acts of Massachusetts of the year 1910."

The certificates also contain the following legend as required by the antitrust decree cited:

"The shares represented by the within certificate are entitled to preference in liquidation according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17th, 1914, as modified by the decree of said Court entered on the 4th day of June, 1923, in the case of the *United States of America* v. *The New York, New Haven and Hartford Railroad Company and others.*"

by sanction of the Interstate Commerce Commission given on August 13, 1936, became the representative of 19,577 shares of publicly held preferred stock. The Protective Committee on April 3, 1941, also filed its Petition for Order 570 seeking to compel action by the New Haven trustees to bring about a liquidation of the Holding Company, which was the contingency upon which the guaranty of par value depended. On April 10, 1941, the New Haven trustees duly answered this Petition and the original claim, asserting that all claims in behalf of the preferred stock were so uncertain and contingent as not to be allowable.

Meanwhile the Interstate Commerce Commission (by Division 4) had submitted its Report and Order of March 22, 1940, on the New Haven Plan, 239 I. C. C. 337, in which it concluded that the preferred stock guaranty should be disaffirmed. The Commission adhered to this conclusion through all Supplemental Reports and Orders, and the disaffirmance was part of the Plan as finally approved, confirmed, and consummated.

On March 6, 1944, the Plan of Reorganization was approved; and on that same date the reorganization court denied the Petition for Order 570 (seeking a liquidation of the Holding Company) on the ground that such liquidation was not to the advantage of the New Haven estate (the holder of the majority of the preferred).

On July 28, 1944, the reorganization court decided Claim 82, which was treated as one for an allowance (1) on account of a breach of the guaranty of $100 (par value) on the preferred stock by reason of the disaffirmance of the guaranty under the Plan, and (2) on account of a breach of the guaranty of the stipulated dividends on the preferred stock. While allowing a payment of $32 per share (payable in common stock of the reorganized New Haven) for breach of the dividend payment guaranty (an allowance not disputed here), the court disallowed in full the claim based on disaffirmance of the guaranty of par value on liquidation. Order 763 entered on August 4, 1944, described this latter branch of the claim as "wholy disallowed, denied and dis-

missed." The reason given by the court for this denial was that, under the Massachusetts Acts incorporating the Holding Company, only the New Haven trustees, as owners of the majority of the preferred stock, had power to institute liquidation proceedings. See *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591, 54 N. E. 2d 183. Since the contingency of the trustees' so acting might not, and probably would not, come to pass, the court held that no loss had been proved on account of the breach of the par value guaranty. No appeal was ever taken from either Order 570 or Order 763.

Meanwhile, between January 27 and March 8, 1944, Delaware purchased 10,000 shares of the publicly held preferred stock of the Holding Company, most of which had been previously represented by the Protective Committee of the preferred stockholders. The last of Delaware's purchases was made only two days after entry of the Memorandum of Decision directing denial of Petition for Order 570 and almost five months before entry of Order 763, which adjudicated Claim 82. The stock purchased by Delaware never was transferred on the Holding Company's transfer books, but remained in the name of Delaware's brokers. Delaware never filed an appearance or participated in its own right and name in the reorganization proceedings until the filing of the present petition; nor, so far as appears, did it ever indicate that it disassociated itself from the prosecution of Claim 82 or the management of Petition for Order 570 by the Protective Committee for the publicly held preferred stock. When Delaware purchased the preferred shares it knew the New Haven was "in bankruptcy" and its attorneys carefully investigated the status of the Holding Company stock.

In 1945, Delaware supported legislation in the Massachusetts General Court to obtain dissolution of the Holding Company by legislative fiat; but that year the attempt failed. In 1946, however, the Massachusetts Legislature by its Chapter 518 of Acts of 1946 annulled the corporate existence of the Holding Company and provided for its receivership and liquidation. On July 3, 1947, at the earliest permissible date, Delaware joined with other

preferred shareholders in a petition to a Massachusetts court for the receivership and liquidation of the Holding Company. So when the Final Decree and Order of Consummation in the New Haven reorganization proceedings was entered two months thereafter, Delaware, despite energetic activities on other fronts, had taken no part whatsoever in those proceedings.

In 1949, after the constitutionality of the Massachusetts Dissolution Act was upheld, *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 323 Mass. 282, 81 N. E. 2d 553, appeal dismissed 336 U. S. 932, the liquidation of the Holding Company proceeded. Upon liquidation Delaware's contention that the lien of the publicly held preferred stock upon the Holding Company assets was prior to that of the preferred stock held by the New Haven estate was overruled, and the Massachusetts liquidation court allowed only $11.32 per share on this stock. See *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 328 Mass. 63, 102 N. E. 2d 67, certiorari denied 343 U. S. 920. Notice of this allowance was sent to preferred stockholders on March 6, 1953. The present petition then followed. It sought for Delaware the difference between the $100 par value of the preferred stock and the $11.32 recovered in the Massachusetts liquidation proceedings—notwithstanding the Final Decree in the reorganization and its long delay both from that and from the earlier disallowance of the claim by the reorganization court.

The demand of Delaware for a reopening is based upon the arguments that (1) Judge Hincks disallowed the claim based on par value at liquidation because he failed to consider the then apparently remote possibility of liquidation of the Holding Company by legislation, and (2) Delaware, now having secured such liquidation and the value of its claim now being capable of exact determination, should have its day in court. But these arguments do not square with what happened or indeed its own behavior throughout.

Delaware contends initially that jurisdiction over the claim of the public holders of preferred stock was expressly reserved to

the reorganization court. It also asserts that the branch of Claim 82 relating to guaranty of par value was disallowed in full by the district court for the reason that the claim was not capable of liquidation; therefore this branch of Claim 82 continued to survive as an unliquidated claim. This contention rests upon §§J(17) and K of the final New Haven Plan (quoted at 128 F. Supp. 556), which provided first for payment in new common stock of the New Haven of any claims allowed for breach of the contract of guaranty of Holding Company preferred stock "to the extent finally allowed by the Court," and second for no other payment or assumption of the guaranty by the reorganized company. And there was a further provision requiring the court at the time of consummation of the Plan to determine the amount of common stock necessary to be reserved "for the satisfaction of claims not then liquidated" and to reserve the amount so determined for that purpose.

Hence it is argued that jurisdiction over the "unliquidated" branch of Claim 82 survived the consummation of the Plan and must now be satisfied from the common stock thus reserved for the purpose. This theory, however, runs afoul of the clear language of both the Plan and the Orders and Opinions of the district court. The "Plan" was approved by the reorganization court on March 6, 1944, and the provision of §J(17) as of that date looks to a future determination of the amount of the guaranty claim by the court. Such a determination took place on August 4, 1944, when the claim was allowed in the amount of $32 for defaulted dividends, and was "wholly disallowed, denied and dismissed" as to any further amount. It is difficult to imagine any allowance more "final" than this or any "liquidation" more explicit. Order 763 by the very force of its language clearly took Claim 82 out of the category of unliquidated claims contemplated by the provision as to them. Moreover, there is evidence that this provision was added in the Fifth Supplemental Report to provide for three categories of claimants: (1) the "Secured Sixes," (2) the Boston Terminal Company trustee, and (3) the Boston and Providence Railroad Company. There is nothing to

suggest that this paragraph was intended to cover claims upon Holding Company preferred stock.

Delaware also attempts to rest jurisdiction upon two provisions of the Final Decree, quoted at 128 F. Supp. 556, 557, from Section XI, 2, giving the court authority to act (f) on any claim filed or provided for in the Plan, but unfixed as to amount, and (g) as to the reserved shares of "Common Stock of the Reorganized Company in so far as necessary to provide for any claim, including the claim of the Secured Sixes" likewise remaining unfixed as to amount. These sections, as it appears from the record, were included in the Decree to accommodate the claims of the "Secured Sixes," the Boston Terminal Company trustee, and the Boston and Providence Railroad Company—all of which were not expected to be "fixed" or "liquidated" until after consummation. Though Delaware vigorously argues that these reservatons of jurisdiction may also be used to cover Claim 82, its contention is of course rooted in its basic premise that the Claim was never "fixed" or "liquidated" before consummation. Since we have found this premise wholly erroneous, Delaware's present argument must fail. Only by a tortured construction of otherwise plain language could we conclude that Delaware's claim is within the court's express reservation of jurisdiction. Such a reservation should not be construed overbroadly. *Towers Hotel Corp.* v. *Lafayette Nat. Bank of Brooklyn in N. Y.*, 2 Cir., 148 F. 2d 145; *North American Car Corp.* v. *Peerless Weighing & Vending Machine Corp.*, 2 Cir., 143 F. 2d 938. Thus we are quite convinced that there was no reservation of jurisdiction over Delaware's claim. Had we been more doubtful, we should still have given weight to the persuasive opinion of Judge Hincks, who was thoroughly familiar with the Plan of Reorganization. *Commission of Dept. of Public Utilities of Com. of Mass.* v. *New York, N. H. & H. R. Co.*, 2 Cir., 178 F. 2d 559, 563, 564, certiorari denied 339 U. S. 943.

Delaware also asserts that the district court had power to reopen its Final Decree under §§2a(8) or 2a(2) of the Bankruptcy Act, 11 U. S. C. §§11(a)(8) or 11(a)(2), or under

F. R. C. P., rule 60(b). Judge Hincks in dealing with this question has concluded that, whether or not these provisions apply to railroad reorganization proceedings, they add nothing to the power of the Court of Bankruptcy in exercising the powers of a court of equity to reopen and revise its own decrees. He found that these equity powers extended to §77 proceedings by virtue of §77(a), which provides that the reorganization court "may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose." He reached this conclusion despite the tenor of finality in §77(f) and the wording of § XI, 3, of the Final Decree, which, except for the express reservations of jurisdiction stated in the Decree, "wholly terminated" and "closed" the proceedings.

We do not here decide whether the power to reopen a final decree in railroad reorganization proceedings, if existing, is to be derived from the inherent equity powers of the reorganization court or from §2a(8) of the Bankruptcy Act or from F. R. 60(b). See *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144; *In re Lowerree*, 2 Cir., 157 F. 2d 831; *Grand Union Equipment Co.* v. *Lippner*, 2 Cir., 167 F. 2d 958, 961; *New York, N. H. & H. R. Co.*, v. *RFC*, 2 Cir., 180 F. 2d 241. But from whatever source derived, it may be exercised only if the equitable standing of the applicant for such relief justifies a reopening. See *Grand Union Equipment Co.* v. *Lippner, supra*, 2 Cir., 167 F. 2d 958, 961. In this case the equities are so strongly adverse to Delaware that the district judge clearly abused no discretion vested in him when he refused to act.

The district court found that Delaware at least as early as January, 1945, was considering the possibility of seeking liquidation of the Holding Company by legislation; and this may have been Delaware's goal as early as May, 1944, when (as it reported in its 1944 Annual Report) it publicly promised to "take steps

to secure the distribution of Boston and Maine stock held by the Holding Company." The Dissolution Act was passed with Delaware's active support in 1946; and on July 3, 1947, a petition was filed in a Massachusetts court seeking liquidation of the Holding Company. All these events transpired before the Final Decree of September 11, 1947. Delaware has offered no satisfactory explanation why it deliberately ignored the reorganization proceedings while it sought dissolution in Massachusetts. Judge Hincks adjudicated Claim 82 without considering the possibility of a legislative dissolution of the Holding Company—an entirely reasonable course of action under the facts available to him. Had Delaware taken the obvious step of bringing to the attention of the court its maneuvers in Massachusetts, the court might have valued the contingency differently or might have postponed adjudication of the par value claim and reserved jurisdiction to determine it after the Final Decree. The policy of finality in reorganization decrees may not be ignored in order to reward such unjustifiable tardiness. See *Towers Hotel Corp.* v. *Lafayette Nat. Bank of Brooklyn in N. Y., supra*, 2 Cir., 148 F. 2d 145, 148.

Delaware asserts that its delay here was justified because the Claim for par value, being unliquidated, was preserved by §J(17) of the Plan, and that no effective action in the reorganization court could be taken until the Claim was finally liquidated by action in Massachusetts. Since, as we have shown, Claim 82 was not unliquidated, the argument fails. We find it difficult to conceive of reasonable reliance on the preservation of a claim as "unliquidated" when that claim has been "wholly . . . denied and dismissed."

Although in general a plan may not destroy a contingent claim without providing for it in some manner—see *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 2 Cir., 161 F. 2d 413, 428, certiorari denied *Institutional Group for Boston Terminal Bonds* v. *New York, N. H. & H. R. Co.*, 331 U. S. 859—we conclude that here, where a claimant has deliberately refrained

from disclosing to the court before consummation the possibility of liquidation by legislation, it cannot now be heard to assert that the Plan must be interpreted to provide for its "unliquidated" claim.

Though Judge Hincks found Delaware's unexcused delay sufficient in itself to justify dismissal of the petition, he went on to hold the petition barred because of the intervening rights of holders of "Certificates of Interest," which vested on the basis of the Final Decree. These certificates entitled unsecured creditors to share pro rata in the common stock of the reorganized New Haven which remained after satisfaction of the claims unliquidated at consummation of the Plan. To allow Delaware any satisfaction of its claim would impair the rights of Certificate Holders by a like amount. There have been active dealings in the Certificates since their issuance. We agree with Judge Hincks that the intervention of vested rights furnishes an additional reason for refusing to reopen the proceedings. See *In re Peyton Realty Co.*, 3 Cir., 148 F. 2d 771.

AFFIRMED.

APPENDIX II

Section 77, Bankruptcy Act of 1938 as Amended

(b) . . . The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. . . .

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, credi-

tors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same. . . .

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan

and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. . . .

(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.